Supreme Court, U.S.
FILED
OCT 20 2010
OFFICE OF THE CLERK

No. 08-1314

IN THE
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
California Court of Appeal,
Fourth Appellate District, Division Three

REPLY BRIEF FOR PETITIONERS

MARTIN N. BUCHANAN
Counsel of record
Niddrie, Fish & Buchanan
750 B Street, Suite 3300
San Diego, CA 92101
(619) 238-2426
mbuchanan@nfblawyers.com

DAVID J. BENNION
Law Offices of David J. Bennion
95 South Market St., Suite 360
San Jose, CA 95113
(408) 298-1948

DAVID R. LIRA
Girardi | Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017
(213) 977-0211

ALLISON M. ZIEVE
Public Citizen Litigation
Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioners

October 2010

914

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. A FINDING OF NO PREEMPTION IS DICTATED BY BOTH *GEIER* AND *SPRIETSMA* 2

II. RESPONDENTS IMPROPERLY RELY ON FOUR DECADES OF AGENCY MATERIALS TO ASSERT POLICIES NOT REFLECTED IN THE RULE OR ITS CONTEMPORANEOUS REGULATORY HISTORY 7

A. Agency Materials Predating the 1987-1989 Regulatory History 8

B. Agency Materials Postdating the 1987-1989 Regulatory History 13

III. RESPONDENTS RELY ON IRRELEVANT FACTORS RELATING SOLELY TO REAR-CENTER SEATS 18

IV. THE COURT SHOULD GIVE WEIGHT TO THE AGENCY'S VIEW THAT PETITIONERS' COMMON-LAW CLAIMS DO NOT POSE ANY OBSTACLE TO ITS OWN POLICY OBJECTIVES 19

CONCLUSION 21

ADDENDUM

Letter from Philip R. Recht, NHTSA General Counsel, to Roger Matoba (Dec. 28, 1994) 1a

TABLE OF AUTHORITIES

CASES	Pages
Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008)	19
Carden v. General Motors Corp., 509 F.3d 227 (5th Cir. 2007)	20
Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001)	4
Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992)	4
Geier v. America Honda Motor Co., 529 U.S. 861 (2000)	*passim*
Griffith v. General Motors Corp., 303 F.3d 1276 (11th Cir. 2002)	20
Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981)	16
Heinricher v. Volvo Car Corp., 809 N.E.2d 1094 (Mass. App. Ct. 2004)	20
Hurley v. Motor Coach Industries, Inc., 222 F.3d 377 (7th Cir. 2000)	20
Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983)	17
Roland v. General Motors Corp., 881 N.E.2d 722 (Ind. Ct. App. 2008)	20
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)	5, 6, 19

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 4, 7, 20

STATUTORY MATERIALS

49 U.S.C. § 30102(a)(9) 17

49 U.S.C. § 30103(e) 17

REGULATORY MATERIALS

Federal Motor Vehicle Safety Standard 208,
49 C.F.R. § 571.208 6

Federal Motor Vehicle Safety Standard 213,
49 C.F.R. § 571.213 11

45 Fed. Reg. 81,625 (Dec. 11, 1980) 12

50 Fed. Reg. 27,633 (July 5, 1985) 10

50 Fed. Reg. 46,056 (Nov. 6, 1985) 9

51 Fed. Reg. 5,335 (Feb. 13, 1986) 12

52 Fed. Reg. 22,818 (June 16, 1987) 13

53 Fed. Reg. 24,394 (June 28, 1988) 10

53 Fed. Reg. 47,982 (Nov. 29, 1988) ..... *passim*

54 Fed. Reg. 25,275 (June 14, 1989) 1, 8

54 Fed. Reg. 46,257 (Nov. 2, 1989) ..... *passim*

58 Fed. Reg. 49,928 (Sept. 3, 1993) 11, 12

64 Fed. Reg. 10,786 (Mar. 5, 1999) 10

69 Fed. Reg. 70,904 (Dec. 8, 2004) 15

INTRODUCTION

In 1989, the National Highway Traffic Safety Administration (NHTSA) concluded that Type 2 (lap/shoulder) seatbelts were safer and more effective than Type 1 (lap-only) seatbelts and mandated installation of Type 2 seatbelts for the rear outboard seats of passenger vehicles. 54 Fed. Reg. 46,257, 46,257-58 (Nov. 2, 1989); 54 Fed. Reg. 25,275, 25,275-76 (June 15, 1989); 53 Fed. Reg. 47,982, 47,982-84 (Nov. 29, 1988). In proposing the new rule, the agency expressly found that Type 2 seatbelts would provide greater safety protection for children in booster seats and older children, and would have "no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts." 53 Fed. Reg. at 47,988-89. The agency also offered a clear explanation for choosing not to mandate Type 2 seatbelts for the *aisle* seats of passenger vans—a concern that the shoulder belt would obstruct the aisle if anchored to the side of the vehicle. 54 Fed Reg. at 46,258. At the same time, NHTSA "encourage[d]" manufacturers to "design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions." *Id.*

Despite the agency's preference for Type 2 seatbelts and its statement encouraging their installation in aisle seats, respondents assert that petitioners' common-law claim that Mazda should have installed a Type 2 seatbelt in the aisle seat of a 1993 minivan is preempted because it conflicts with the agency's 1989 policy objectives. Unable to support this claim with either the contemporaneous regulatory history or the agency's own explanation of its objectives, respondents have compiled a scattershot collection of excerpts from NHTSA documents spanning four

decades in support of an argument that the agency wanted manufacturers to have the "freedom to choose" between Type 1 and Type 2 seatbelts for aisle seats. Respondents also assert that the agency's view that its own 1989 regulation was *not* intended to guarantee "freedom to choose" is entitled to no weight because NHTSA did not file briefs in other cases litigated by other parties in lower state and federal courts.

If adopted, respondents' approach would result in an extraordinary expansion of implied obstacle preemption. It would give courts license to displace state law by roving through decades of regulatory documents—including documents that postdate the regulation at issue by many years and reflect different agency concerns—to ascribe to the agency supposed policies distinct from those manifested in the applicable rule and its contemporaneous regulatory history. This Court has never endorsed such a free-wheeling and unprincipled theory of preemption. Nor has the Court ever hinted that a federal agency's position on the purpose and effect of its own regulations will be disregarded unless the agency has interceded in lower-court litigation on the issue. Respondents' sweeping theory of implied obstacle preemption and their casual invitation to cast aside the agency's view that the state-law claims at issue pose no obstacle to accomplishing its objectives should be rejected.

ARGUMENT

I. A FINDING OF NO PREEMPTION IS DICTATED BY BOTH *GEIER* AND *SPRIETSMA*.

A. Respondents and their amici attempt to portray this case as a carbon copy of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Specifically, respondents claim that the agency "intended to leave manufacturers free to

choose a Type 1 or Type 2 belt for the rear center/aisle seating position at issue, in order to serve largely the same federal objectives as the rule in *Geier*." Res.Br. 15-16. Respondents assert that they are not claiming a conflict simply because they complied with one option permitted by Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208, but because the standard "embodies a policy judgment that manufacturers should be free to choose between Type 1 and Type 2 belts in rear center/aisle seats." *Id.* at 2-3.

Respondents' disclaimer narrows the issues in dispute. Petitioners have never contested that their common-law claims would be preempted under *Geier* if NHTSA's 1989 rule and its contemporaneous regulatory history clearly established a "deliberately imposed" policy that preserving the option to install Type 1 or Type 2 seatbelts in aisle seats was essential to achieving the agency's safety-related objectives. *Geier*, 529 U.S. at 881. However, the 1989 seatbelt rule was *not* designed to serve the same federal objectives as the rule in *Geier*, and respondents' "freedom-to-choose" theory is at odds with both the 1987-1989 regulatory history and the agency's own explanation of its objectives. *See infra* Parts II-IV. Thus, under the Court's approach in *Geier*, the Williamsons' state-law claim is not preempted. *See* Pet.Br. 26-50; U.S.Br. 8-31.

1. Respondents assert that petitioners are arguing "a legal theory straight out of the *dissent* in *Geier*" by relying on the "strong presumption" against preemption. Res.Br. 2, 21. But *Geier* did not reject the ordinary presumption against preemption; it rejected the notion that the Motor Vehicle Safety Act imposed a "'special burden' *beyond that inherent in ordinary pre-emption principles*–which 'special burden' would *specially disfavor* pre-emption here." *Geier*, 529 U.S. at 870 (emphasis added). In finding

"no *unusual*, *'special* burden' against pre-emption," *id.* at 873 (emphasis added), the *Geier* majority concluded that "ordinary pre-emption principles ... apply." *Id.* at 874. As the Court has since confirmed, ordinary preemption principles include a presumption against implied conflict preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009). Indeed, only one year after *Geier*, the author of the majority opinion himself expressed the view that a "strong presumption *against* preemption" applies to claims of obstacle preemption. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 156-57 (2001) (Breyer, J., dissenting).

Furthermore, the *Geier* majority *agreed* with "the dissent's basic position that a court should not find preemption too readily in the absence of clear evidence of a conflict." *Geier*, 529 U.S. at 885. This "clear evidence" standard sets the bar for *overcoming* the ordinary presumption against preemption. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109-11 (1992) (Kennedy, J., concurring) (stating that obstacle preemption requires an "'irreconcilable conflict'" with federal objectives that are "conveyed with clarity" and criticizing "the plurality's broad view" as being contrary to the presumption against preemption).

2. Relying on *Geier*, respondents claim that it makes no difference that NHTSA "encourage[d]" manufacturers to install lap/shoulder belts at aisle seating positions. 54 Fed. Reg. at 46,258. According to respondents, NHTSA similarly "encouraged" airbags in 1984 by giving manufacturers a form of extra credit for airbag installation, yet *Geier* still found the airbag claim to be preempted. Res. Br. 42-43.

This argument misreads *Geier*. As *Geier* noted, the contemporaneous regulatory history of the 1984 rule on passive restraints explained that this "extra credit" was

necessary to "'encourage manufacturers to equip *at least* some of their cars with airbags'" because otherwise manufacturers would have elected to meet the passive restraint requirements "almost entirely (more than 99%) through the installation of more affordable automatic belt systems." *Geier*, 529 U.S. at 879-80 (citation omitted). Thus, *Geier* concluded, "[t]he credit provision *reinforces* the point that [the 1984 version of] FMVSS 208 sought a gradually developing mix of passive restraint devices ...." *Id.* at 880.

No similar rationale explains the agency's 1989 policy of encouraging Type 2 seatbelts in aisle seats. The regulatory history says nothing about ensuring a variety of different seatbelt types or phasing in Type 2 seatbelts over time. Because the agency *mandated* Type 2 seatbelts for rear *outboard* seats, encouraging manufacturers also to install the same type of seatbelt in *other* rear seats would obviously have defeated any goal of promoting diverse restraint types. Accordingly, this lawsuit is fully consistent with the agency's 1989 policy objectives as described in both the contemporaneous regulatory history and the government's brief. U.S.Br. 14-19 (explaining that 1989 rule did not seek to promote diverse seatbelt designs or preserve a role for Type 1 seatbelts).

B. Although the Court's approach in *Geier* supports petitioners here, the closest analogy is not to *Geier* but to *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). There, the Coast Guard's decision not to mandate propeller guards was based on feasibility concerns similar to those motivating NHTSA's decision not to mandate Type 2 seatbelts for aisle seats. *Id.* at 61-62, 66-68. The Coast Guard's "focus ... on the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation,'" *id.* at 67, was comparable to NHTSA's recognition that there were unique technological issues pertaining to Type 2 seatbelts

in aisle seats. 54 Fed. Reg. at 46,258. And just as the Coast Guard's decision "left the law applicable to propeller guards exactly the same as it had been before," *Sprietsma*, 537 U.S. at 65, NHTSA's 1989 rule left the law applicable to aisle seating positions exactly the same as it had been before.[1]

Respondents argue that *Sprietsma* is inapposite because it involved an agency's decision "not to regulate *at all* in the pertinent area (propeller guards)." Res.Br. 38. In *Sprietsma*, however, the Coast Guard had already "promulgated a host of detailed regulations" on boat safety and performance, including "the use of specified equipment" and "precise standards governing the design and manufacture of boats themselves and of associated equipment, such as electrical and fuel systems, ventilation, and 'start-in-gear protection' devices." *Sprietsma*, 537 U.S. at 60. Thus, *Sprietsma* involved an agency's deliberate and carefully considered decision not to mandate *one particular type* of safety device, not a decision not to regulate *at all*. Here, NHTSA made a similar decision not to mandate one particular type of safety device for some rear seating positions. Indeed, adding a factor not present in *Sprietsma*, the agency stated a preference *in favor* of Type 2 seatbelts and *encouraged* their installation in aisle seats. 54 Fed. Reg. at 46,258.

---

[1]For aisle and center seating positions, the 1989 amendments left unchanged a preexisting provision of FMVSS 208, which required that "each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2." 49 C.F.R. § 571.208 at S4.2.1(b) (1988 and as amended Nov. 2, 1989).

II. RESPONDENTS IMPROPERLY RELY ON FOUR DECADES OF AGENCY MATERIALS TO ASSERT POLICIES NOT REFLECTED IN THE RULE OR ITS CONTEMPORANEOUS REGULATORY HISTORY.

In the contemporaneous regulatory history, NHTSA explained why it had decided not to mandate Type 2 seatbelts for aisle and center seats. Its explanations made *no* reference to child safety, public acceptance of Type 2 seatbelts, diversity of seatbelt types, or freedom to choose. 54 Fed. Reg. at 46,258; 53 Fed. Reg. at 47,984-85.

Implicitly recognizing that their "freedom-to-choose" theory is not supported by the 1987-1989 regulatory history, respondents attempt to expand the universe of relevant agency materials by two decades on either side of the 1989 rule, with citations to NHTSA documents from as early as 1970, Res.Br. 6, to as recent as 2010. *Id.* at 30 n.11. Under *Geier*, however, the proper focus is on the agency policies reflected in the rule and its "contemporaneous" regulatory history. *See Geier*, 529 U.S. at 877, 886; *Wyeth*, 129 S. Ct. at 1203 (explaining that *Geier* "examin[ed] the rule itself and the DOT's contemporaneous record, which revealed the factors the agency had weighed and the balance it had struck"). Agency materials *predating* the 1987-1989 rulemaking are relevant only to the extent that the contemporaneous regulatory history establishes that they "influenced" the agency's decisions. *Id.* at 876. Agency materials *postdating* the 1989 rule are relevant only to the extent they explain the agency's policies *in 1989*. None of the materials cited by respondents fits these descriptions.

A. Agency Materials Predating the 1987-1989 Regulatory History

1. In *Geier*, this Court gave some consideration to the history of FMVSS 208 predating the 1984 amendment on passive restraints. Specifically, the Court considered the agency's prior experience with the highly unpopular "interlock ignition" device because "[t]hat experience influenced DOT's subsequent passive restraint initiatives." *Geier*, 529 U.S. at 876. As the Court noted, the *contemporaneous* 1984 regulatory history affirmatively demonstrated that the agency had rejected an "all airbag" standard because of concerns about a similar type of "public backlash" against airbags and a desire "to avoid another interlock-type fiasco." *Id.* at 878-89 (citing agency comments in 1984 regulatory history).

Respondents argue that the same sort of "public backlash" rationale applies to the 1989 rule on Type 2 seatbelts, citing agency comments from 1981-1984 regarding public acceptance *of passive restraints*—the same agency comments relied on in *Geier*. Res.Br. 12, 35, 45. This effort to piggyback on the concerns that drove the 1984 passive restraint rulemaking at issue in *Geier* is misdirected. Nothing in the 1987-1989 regulatory history on Type 2 seatbelts suggests that any such concern animated the 1989 seatbelt rule. On the contrary, the agency commented on the increased use and public acceptance of seatbelts after 1984, and it predicted that people who had become accustomed to wearing Type 2 seatbelts in front seats would be *more* likely to buckle up if Type 2 seatbelts were installed in rear seats. 54 Fed. Reg. at 46,257; 54 Fed. Reg. at 25,275-76; 53 Fed. Reg. at 47,982-84. Thus, respondents have it backwards when they suggest an agency concern "that mandating Type 2 seatbelts could *depress* overall seatbelt usage." Res.Br. 6.

Respondents also cite NHTSA statements from the 1970's regarding low public acceptance of seatbelts, complaints about comfort and fit, and problems of chest fit and pressure for women using Type 2 seatbelts. Res.Br. 6-7. By 1985, however, the agency had addressed these issues by imposing additional requirements to improve the fit and comfort of seatbelts. 50 Fed. Reg. 46,056 (Nov. 6, 1985) (final rule implementing changes to improve comfort of seatbelts, including new limit on contact pressure for upper torso seatbelt webbing). Moreover, the 1987-1989 Federal Register notices specifically commented on "Comfort and Convenience" without mentioning any continuing concern about Type 2 seatbelts. 54 Fed. Reg. at 46,264-25; 53 Fed. Reg. at 47,990-91. Indeed, the agency emphasized that the new "requirement for rear seat lap/shoulder belts will ensure ... comfort and convenience for ease of use." 53 Fed. Reg. at 47,984. Nothing in the contemporaneous regulatory history supports respondents' claim that any of these concerns from the 1970's influenced the agency's 1989 decision not to mandate Type 2 seatbelts for center or aisle seats.

2. Respondents further suggest that the child safety concern referred to by NHTSA when it denied a 1984 petition for Type 2 seatbelts was also a factor in its 1989 decision not to require Type 2 seatbelts for center and aisle seats. However, as NHTSA explained in 1988, its 1984 assessment regarding child safety was based on its earlier preference for a "then-popular type of child restraint" with a tether anchorage that was no longer in production by the time of the 1987-1989 rulemaking. 53 Fed. Reg. at 47,982-83 (noting that "child restraint production had shifted away from those that were designed to have a tether anchored to the vehicle"). Although respondents claim that "tethered child seats remained common," Res.Br. 9, they cite nothing

to support this assertion, and it is at odds with what NHTSA said in the regulatory history. *See also* 53 Fed. Reg. 24,394, 24,395 (June 28, 1988) ("Child seating systems equipped with top tether straps virtually have disappeared"); 50 Fed. Reg. 27,633, 27,634-35 (July 5, 1985) (citing 1984 study finding widespread misuse of tethered child restraints and stating that "the proportion of new child restraints equipped with tether straps has declined dramatically"). In short, the child safety concerns that caused the agency to deny the 1984 petition had *no* influence on its 1989 decision not to mandate Type 2 seatbelts for aisle seats.[2]

3. Respondents mistakenly rely on documents from 1970 and 1984 as evidence that "child seats of that era were generally more compatible with Type 1 belts." Res.Br. 6. NHTSA specifically addressed child-seat compatibility during the 1987-1989 rulemaking. The Notice of Proposed Rulemaking (NPRM) initially stated that "the agency has *heard reports* that *some current combinations* of child restraints and rear safety belt systems may be incompatible" and it solicited "comments on the current magnitude of the incompatibility problem." 53 Fed. Reg. at 47,988 (emphasis added). However, the only comments on compatibility that the agency discussed in the final rule were those relating to emergency locking retractors (ELRs). 54 Fed. Reg. at 46,261-62. And respondents

[2] Respondents claim that the type of tether anchorage referred to in the 1984 denial was "akin to what later would become known as the 'LATCH' system." Res.Br. 8-9. They cite nothing to support their claim that these are similar types of child restraints. In any event, NHTSA did not mandate the LATCH system until 1999, a decade *after* it issued the 1989 rule and six years *after* the Williamsons' minivan was manufactured. 64 Fed. Reg. 10,786 (Mar. 5, 1999).

concede that the controversy involving ELRs does not support them here. Res.Br. 10 n.5. Furthermore, the agency expressed confidence in 1989 that the lockability requirement would provide additional assurance that child seats would be safely secured using *either* a "lap belt *or* lap belt portion of a lap/shoulder belt." 54 Fed. Reg. at 46,262 (emphasis added). Simply put, the agency did not believe that there was any compatibility issue.

4. Respondents also rely on NHTSA's longstanding position that rear-center seats are safest for young children, and the fact that FMVSS 213, 49 C.F.R. § 571.213, which addresses child restraint systems, did not permit testing of child seats using shoulder belts until 1994. Res.Br. 10, 30. However, neither of these factors reflects an agency policy against Type 2 seatbelts in center or aisle seats. As respondents acknowledge, the rear-center seat is generally considered the safest for children because of "its distance from potential points of impact" in a side impact collision, not for reasons relevant to the issues here. Res.Br. 30 (citation omitted). Moreover, the former lap belt testing rule of FMVSS 213 was based on two factors having nothing to do with a supposed federal policy against the use of Type 2 seatbelts with child seats. First, for "cost" reasons, "the seat assembly used to test child restraints was developed to represent the typical vehicle bench seat," which "at the time of the development of Standard 213's dynamic test typically had only a lap belt, and not a lap/shoulder belt system." 58 Fed. Reg. 46,928, 46,929 (Sept. 3, 1993). The key point was thus to establish test conditions that utilized the type of belt most commonly used at that time (Type 1), not to preclude installation of a belt that provided greater protection (Type 2). This point is confirmed by NHTSA's second rationale: testing child restraints with lap belts "ensured that the restraint will

provide adequate safety even if a supplemental restraint (e.g., a top tether or the shoulder portion of the lap/shoulder combination) is not used." *Id.* FMVSS 213 thus offers respondents no support here.

5. Respondents cite a 1980 statement by NHTSA expressing concern that children between 5 and 12 years old "may be too short to use shoulder belts designed for adults." Res.Br. 30 (citing 45 Fed. Reg. 81,625, 81,627 (Dec. 11, 1980)). However, NHTSA went on to note that "unique restraints for these older children are available and include booster seats and shoulder harnesses." 45 Fed. Reg. at 81,627. In the 1987-1989 rulemaking, NHTSA made clear that to prevent the shoulder belt from passing over the face or neck of a child in this age group, parents should either use a booster seat or place the shoulder portion of the belt behind the child. 53 Fed. Reg. at 47,988.[3] Thus, NHTSA concluded that Type 2 seatbelts "would offer benefits for children riding in some types of booster seats, would have *no positive or negative effects* on children riding in most designs of car seats *and children that are too small to use shoulder belts*, and would offer older children the same incremental safety protection that would be afforded adult rear seat occupants." *Id.* at 47,988-89 (emphasis added). Contrary to respondents' claim, the agency did *not* make any finding that "Type 2 belts were

---

[3]Respondents wrongly suggest that "the first booster seats compatible with shoulder belts" were not manufactured until 1994. Res.Br. 13. In the 1988 NPRM, the agency specifically stated: "Booster seats are *often designed* to use vehicle shoulder belts to provide additional upper torso restraint." 53 Fed. Reg. at 47,988 (emphasis added). As early as 1986, NHTSA noted that some booster seats were "designed to use the shoulder belt in a vehicle so that it will provide the necessary upper torso restraint." 51 Fed. Reg. 5,335, 5,338 (Feb. 13, 1986).

unsafe for this key group" or that "Type 1 belts worked better with most child restraint systems." Res.Br. 30, 50.[4]

B. Agency Materials Postdating the 1987-1989 Regulatory History

1. Respondents also rely on a host of regulatory events and sources that postdate both the 1989 version of FMVSS 208 and the 1993 manufacture of the minivan at issue here. These include: (1) a 1994 NHTSA survey of child seat usage (Res.Br. 9, 31); (2) a 1994 letter from NHTSA's Chief Counsel responding to a letter from a private citizen (Res.Br. 1-2, 16-17, 28, 33-34, 34 n.12, 42, 51); (3) a 1996 NHTSA publication on misuse of child safety seats (Res.Br. 13); (4) a 1999 rule on seatbelt anchorages (Res.Br. 9 n.3, 13); (5) a 2004 rule allowing the use of detachable, non-integrated shoulder belts (Res.Br. 11); and (6) a current NHTSA warning not to place a shoulder belt behind a child's back (Res.Br. 30 n.11).

---

[4]Respondents' heavy reliance on the 1987 Advance Notice of Proposed Rulemaking (ANPRM) is similarly misplaced. In the ANPRM, the agency expressed its preliminary *opposition* to *any* rule mandating Type 2 seatbelts for rear seats. The agency tentatively concluded that the costs would be "extremely disproportionate to the possible safety benefits." 52 Fed. Reg. 22,818, 22,819 20 (June 16, 1987) ("NHTSA believes it will be difficult to demonstrate that requiring installation of lap/shoulder belts would be cost effective"). In the NPRM, however, the agency repudiated this view and concluded that the costs and benefits had "changed substantially since the ANPRM was issued." 53 Fed. Reg. at 47,983. Because the ANPRM opposed mandating Type 2 seatbelts for *any* rear seats, it sheds no light on the reasons for the agency's subsequent decision to mandate Type 2 seatbelts for rear outboard seats, but not for aisle or center seats.

Respondents do not explain how any of this material is relevant to the preemptive effect of a 1989 regulation. The question presented is whether petitioners' tort claim poses an obstacle to the objectives of the 1989 version of FMVSS 208. None of the post-1989 materials cited by respondents purported to explain or interpret the objectives of the 1989 regulation, and most were based on new facts not available to the agency in 1989. Some also reflected shifting agency policies different from those animating the 1987-1989 rulemaking. For example, NHTSA's current policy discouraging placement of the shoulder belt behind a child obviously differs from its earlier policy that "[i]f a booster seat is not used, the shoulder belt should be routed behind the child, and the child should be protected only by the lap belt." 53 Fed. Reg. at 47,988.

The fact that NHTSA may have reevaluated or modified some of its substantive policies over the past two decades does not retroactively imbue the 1989 amendments to FMVSS 208 with preemptive force. Either providing a choice of options was integral to the accomplishment of the agency's objectives or it was not. The Court must make that determination based on the agency policies reflected in the 1989 version of FMVSS 208 and the "contemporaneous" regulatory history. *Geier*, 529 U.S. at 877, 886. As respondents argued below, *subsequent* agency policies have "'no bearing'" on the preemption issue. *See* Res.Br. in Cal. Ct. App. at 37 n.15 (quoting *Carden v. Gen. Motors Corp.*, 509 F.3d 227, 231 n.1 (5th Cir. 2007)).

Many of respondents' citations to subsequent history are actually directed to criticizing the wisdom of the substantive judgments made by NHTSA in 1989. For example, respondents criticize the agency's 1989 judgment that older children could safely place the shoulder belt

behind their backs, Res.Br. 9, that child restraint production had shifted away from tethers, *id.* at 8-9, that many existing designs of booster seats were compatible with Type 2 seatbelts, *id.* at 13, and that there were no compatibility issues involving other types of child seats. *Id.* at 31. Whatever their merits, these criticisms do not advance respondents' preemption argument. The issue is whether there is a conflict between NHTSA's 1989 objectives and petitioners' common law claims, not whether NHTSA's judgments were sound.[5]

2. Respondents rely heavily on a 1994 letter written by NHTSA's Chief Counsel. *See infra* Addendum. This letter did not discuss preemption and was an informal response to a private citizen's inquiry. Moreover, respondents ignore most of what the letter said. First, the Chief Counsel succinctly explained NHTSA's 1989 decision regarding aisle seats: "NHTSA decided not to require shoulder safety belts at these seating positions because the agency recognized that the belts might obstruct an aisle designed to give access to rear seating positions. Manufacturers are, however, permitted to provide lap/shoulder belts if they choose to do so." *Id.* at 2. Notably, the letter mentioned nothing about child safety, public acceptance, gradual phase-in of Type 2 seatbelts, or diversity of restraint types.

Second, the letter stated that "shoulder safety belts which cross an aisle ... do not in fact prevent rearward

---

[5]Respondents also rely on a 2004 statement by NHTSA that the exclusion for aisle seats was partly due to a concern that "attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. 70,904, 70,905 (Dec. 8, 2004). However, nothing in the contemporaneous regulatory history suggests that this concern was a factor in the 1989 rulemaking.

passengers from exiting the vehicle" and explained that "any difficulty that rearward occupants face in exiting the vehicle is much smaller than that faced by rear seat occupants in a two-door car or the occupants of middle seats." *Id.* The letter went on to emphasize: "In considering the safety of such belts, it is also important to consider the extra protection offered by the shoulder belt to the occupant who wears it." *Id.* Thus, to the extent the letter is probative of agency policy, it suggests that the agency believed the benefits of installing shoulder belts in aisle seats outweighed the risks—even if the shoulder belt extended across the aisle.

Finally, respondents' reliance on the last sentence of the letter is mistaken. In that sentence, the Chief Counsel stated: "We believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with this extra protection against any difficulties related to occupants entering and exiting the vehicle." *Id.* Contrary to respondents' assumption, the fact that a vehicle manufacturer might be in better position to weigh the pros and cons of a safety device does not suggest that NHTSA believed that common-law claims were preempted. State common law requires that manufacturers act reasonably in response to what they know or should know. In the infamous Ford Pinto case, for example, the evidence established that Ford had conducted crash tests, knew about the defective fuel tanks, and could have fixed them at nominal cost, but decided to proceed anyway. *See, e.g., Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360-62 (Cal. Ct. App. 1981). Ford was in the best position to assess the costs and benefits, and it acted unreasonably given its knowledge of the risk.

"[T]he Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety con-

cerns." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983). By defining the federal safety standards as "minimum" standards, 49 U.S.C. § 30102(a)(9), and stating that compliance "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), Congress deliberately preserved state common law as an incentive for manufacturers to develop safer vehicles and as a means of compensating injured victims. Giving vehicle manufacturers a free pass to act unreasonably would defeat the purpose of the law.

3. Ironically, despite their own reliance on random snippets of regulatory history spanning multiple decades, respondents accuse petitioners of advocating a theory of preemption that "flits in and out" over time based on technological developments. Res.Br. 16. This argument confuses the theory of liability on the merits of the state-law claims with the question whether those claims are preempted. Petitioners' theory of *liability* is that respondents had a duty to equip the aisle seat in their vehicle with a Type 2 belt because, at the time the vehicle was manufactured, it was technologically feasible to do so without obstructing the aisle, and a reasonable manufacturer would have done so. Pet.Br. 18; *see also* Res.Br. 36-37 n.13 (acknowledging that feasibility of safer design is one factor for determining *liability* under California common law). However, petitioners have never suggested that their *preemption* argument depends on the feasibility of a safer design. Because this type of seatbelt claim does not conflict with any agency policies embodied in the 1989 version of FMVSS 208, the 1989 rule would not preempt such a claim for *any* vehicle, regardless of when it was manufactured. Although a plaintiff might have difficulty establishing *liability* without proving the feasibility of a safer design, preemption and liability are distinct issues.

III. RESPONDENTS RELY ON IRRELEVANT FACTORS RELATING SOLELY TO REAR-CENTER SEATS.

At the petition stage, respondents acknowledged that "this case involves the use of a Type 1 seatbelt in an aisle seat rather than a true center seat" and observed that NHTSA had identified "unique" reasons for its decision regarding aisle seats. Res.Supp.Br. 7 (citation omitted). Respondents emphasized that what was controlling was "the FMVSS 208 administrative record as it relates to type-2 seatbelts in *rear aisle seats*." *Id.* at 9 (emphasis added). In the merits briefing, however, respondents retreat dramatically from this position by drawing heavily on NHTSA's rationale for not mandating Type 2 seatbelts in rear-*center* seats, such as the agency's discussion of technological issues unique to rear-center seats (potential interference with cargo area and driver's rearward vision), *id.* at 34, and the agency's cost-benefit analysis for rear-center seats. *Id.* at 35-36.

These factors have no bearing on the aisle-seat issue here. In particular, the agency's cost-benefit analysis for rear *center* seats was heavily influenced by their low occupancy rate and the correspondingly lower safety benefits that would accrue from mandating Type 2 seatbelts for those seats. 54 Fed. Reg. at 46,258 (commenting on "small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task"); 53 Fed. Reg. at 47,984 (referring to NHTSA-sponsored survey finding "that the rear center seating position is the least-used seating position in cars"). The second-row aisle seat of a minivan does not have a similarly low occupancy rate—the agency specifically recognized that "these vehicles will have a greater-than-average occupancy rate in the rear seats,

with accompanying greater-than-average benefits." *Id.* at 47,985-86. Accordingly, the agency's cost-benefit analysis for rear-*center* seating positions is irrelevant to the aisle seating position at issue here.[6]

IV. THE COURT SHOULD GIVE WEIGHT TO THE AGENCY'S VIEW THAT PETITIONERS' COMMON-LAW CLAIMS DO NOT POSE ANY OBSTACLE TO ITS OWN POLICY OBJECTIVES.

This Court has repeatedly emphasized that federal agencies have a thorough understanding of their own regulatory objectives. For this reason, when deciding issues of implied obstacle preemption, the Court has given weight to a federal agency's view that state law would *not* interfere with its own objectives. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549 (2008); *Sprietsma*, 537 U.S. at 67-68; *Geier*, 529 U.S. at 883.

Contrary to these precedents, respondents argue that the Court should give *no weight* to NHTSA's view that petitioners' common-law claims would not pose an obstacle to its 1989 policy objectives. According to respondents, the government's position is "inherently suspect" because the agency "sat idle for nearly a decade as one court after

---

[6] With respect to aisle seats of passenger vans, NHTSA cited GM's comment that structural modifications necessary to anchor the shoulder belt to the roof "would impose disproportionately high costs." 54 Fed. Reg. at 46,258. However, NHTSA obviously believed that any feasibility and cost issues could be overcome over time; otherwise, it would not have encouraged manufacturers to design and install Type 2 seatbelts in aisle seats. *Id.* NHTSA did not conduct a cost-benefit analysis specific to aisle seats, other than to comment that rear seat lap/shoulder belts in passenger vans "would offer greater safety benefits than [in] any other vehicle type except passenger cars." 53 Fed. Reg. at 47,986.

another held that FMVSS 208 preempted state tort actions based on failure to install a Type 2 belt." Res.Br. 49.[7]

This argument is not supported by any authority. Respondents do not dispute that the agency's current position is fully consistent with the views it has expressed on the preemptive effect of its own "options" standards in amicus briefs filed with this Court over the past 20 years. Pet.Br. 30-32; U.S.Br. 29-31. This case is thus nothing like *Wyeth*, where the agency expressed one view on preemption in its 2000 notice of proposed rulemaking, but then announced "a dramatic change in position" by taking the opposite view in a 2006 preamble to the final rule. *Wyeth*, 129 S. Ct. at 1202-03.

Respondents' argument amounts to a claim that federal agencies have an affirmative duty to monitor all pending litigation in the lower state and federal courts and to make their views known whenever a litigant or court takes a position contrary to their own. That is quite a stretch.

---

[7] Respondents and their amici exaggerate the weight of the lower court cases on this issue. Aside from this case, there are only three reported seatbelt cases involving the 1989 amendments to FMVSS 208. *Carden*, 509 F.3d 227; *Roland v. General Motors Corp.*, 881 N.E.2d 722 (Ind. Ct. App. 2008); *Heinrichs v. VolvoCar Corp.*, 809 N.E.2d 1094 (Mass. App. Ct. 2004). The two earlier cases included in respondents' "decade" of lower court precedents did *not* involve the 1989 version of FMVSS 208. One involved a front seating position not subject to the 1989 rule. *Griffin v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), and another involved the front driver's seat of a Greyhound bus not subject to the 1989 rule because it had a gross vehicle weight of 28,200 pounds. *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000); see 54 Fed. Reg. at 46,267 (1989 rule limited to small buses with gross vehicle weight of 10,000 pounds or less). Neither of these two cases even mentions the 1989 rule or its regulatory history.

Federal agencies cannot be expected to intercede in every case involving the interpretation or effect of their regulations. Most fundamentally, there is "no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than 'the agency's fair and considered judgment on the matter.'" *Geier*, 529 U.S. at 884 (citation omitted). It would be extraordinary for this Court to disregard the agency's view that petitioners' lawsuit does *not* frustrate the agency's ability to accomplish its own objectives.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Martin N. Buchanan
Counsel of record
Niddrie, Fish & Buchanan
750 B Street, Suite 3300
San Diego, CA 92101
(619) 238-2426
mbuchanan@nfblawyers.com

David R. Lira
Girardi | Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017
(213) 977-0211

David J. Bennion
Law Offices of David J. Bennion
95 South Market St., Suite 360
San Jose, CA 95113
(408) 298-1948

Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

October 2010